IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 67.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, ET AL., *Petitioners,*

v.

PHILLIPS PETROLEUM COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Phillips Petroleum Company (hereinafter called "Phillips"), Respondent here, has filed its Petition for Writ of Ceriorari (No. 107) praying that this Court review the decision of the Court of Appeals in order to correct the portion thereof sustaining the trial court's allowance of interest. We here propose to show that the petition filed on behalf of Ambrose Oldland, et al. (hereinafter called "Plaintiffs"), does not state any proper basis for issuance of the writ.

STATEMENT.

This case was originally commenced by plaintiffs to recover an overriding royalty interest in Phillips' Levison oil and gas lease in the Rangely Field in Colorado, on the theory that a trust relationship resulted from an assignment agreement entered into March 15, 1926, assigning a prospecting permit which formerly covered the same lands. The case was removed to the federal court, and on trial judgment was entered for the defendants. Plaintiffs appealed and the Court of Appeals for the Tenth Circuit reversed the district court saying that:

> "* * * we hold that a trust relationship was created binding upon all parties in the chain of title; that such relationship was not extinguished by the 1935 or 1942 amendments, and that in equity and good conscience, the appellants are entitled to an overriding royalty of 4 per cent of the oil and 7½ per cent of the gas produced, saved and sold from the leasehold estate, free and clear of cost, subject only to the government royalty."

Oldland v. *Gray,* 179 F. 2d 408, 415. The defendants applied for a writ of certiorari, urging (among other things) that the Court of Appeals had in effect rewritten the contract under which plaintiffs claim, and in so doing exceeded its equitable powers. Plaintiffs filed briefs in opposition to the petition. Writ of certiorari was denied. *Gray, et al.,* v. *Oldland, et al.,* 339 U. S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (Cause 673, October Term, 1949).

The Court of Appeals then filed its mandate directing entry of judgment in accord with its decision. The trial court actually awarded judgment for 4 per cent of all oil and 7½ per cent of all gas produced from the lands covered by the lease, plus interest on the value of the proceeds of past production from date of sale at 6 per cent. Phillips then appealed to the Court of Appeals to correct the judgment. That court held on the second appeal that judgment should be for 4 per cent of the oil and 7½ per cent of the gas produced from the leasehold estate or "working

interest," i.e., those percentages of the amount remaining after deducting from total production the amount of government royalties. The allowance of interest was sustained, but Judge Bratton dissented on this point (see *Phillips Petroleum Company* v. *Oldland,* 187 F. 2d 780).

Reference is made to the Petition for Writ of Certiorari in Cause No. 673, October Term, 1949, and to the decisions of the Court of Appeals, Tenth Circuit, reported in 179 F. 2d 408 and 187 F. 2d 780 for a more complete statement of the case.

ARGUMENT.

1. Decision of the Court of Appeals on the Second Appeal Follows the Doctrine of the Law of the Case.

The principle requiring that the law of the case be followed would have been violated only if the Court of Appeals had in its second opinion departed from the decisions reached in its first opinion. It did not.

As above indicated the decision of the Court of Appeals on first appeal upon the merits of the controversy is reflected in the following portion of its opinion (179 F. 2d at 415):

> " * * * we hold that a trust relationship was created binding upon all parties in the chain of title; that such relationship was not extinguished by the 1935 or 1942 amendments, and that in equity and good conscience, the appellants are entitled to an overriding royalty of 4 per cent of the oil and 7½ per cent of the gas produced, saved and sold from the leasehold estate, free and clear of cost, subject only to the government royalty."

This language so patently describes an overriding royalty that is a percentage of the production accruing to the working interest after payment of government royalty that there is little room for interpretation. The term "overriding royalty" is a well understood term in the oil and gas industry. It is defined in *Knight* v. *Chicago Corp.,*

Phillips will be required to pay 8½% more royalty than would have been required originally under the 1926 assignment contract if dual leases had issued as contemplated by that contract. By the decision of the Court, and as to that same one-quarter of the acreage, the appellants suffer a reduction of only 3½% as compared with the 8½% increase suffered by Phillips." • • •

(Tex. Civ. App., 1944), 183 S. W. 2d 666, 670, affirmed 188 S. W. 2d 564, as follows:

> "An overriding royalty is a certain percentage of the working interest which, as between the lessee and assignee, is not charged with the cost of development or production."

In the case of *Wright* v. *Brush,* (C.C.A. 10, 1940) 115 F. 2d 265, at 267, in an opinion written by Judge Huxman it is stated that:

> "An 'overriding royalty' is generally defined as an interest carved out of the lessee's share of the oil also called the working interest, as distinguished from the owner's interest or royalty interest."

See also, *Thornburgh* v. *Cole,* (Okla., 1949) 207 P. 2d 1096, 1098.

Since the overriding royalty is always carved out of the leasehold estate or working interest, it is normally considered as being a fraction or percentage of that working interest or leasehold estate, but it may sometimes be stated as a fraction or percentage of the entire production. It is necessary, therefore, to specify in each instance whether the stated fraction or percentage is applicable to the entire production or only that portion of production creditable to the leasehold estate. This the court did in this instance, specifying that the stated percentages were of oil and gas "produced, saved and sold from the leasehold estate."

The term "leasehold estate" refers, of course, to the interest of the lessee under the oil and gas lease. *Whitt* v. *Kentucky Oil Producing Co.,* (C. A., 1928) 223 Ky. 348, 3 S. W. 2d 786, 789; *McDonald* v. *Sanders,* (Tex. Civ. App., 1947) 207 S. W. 2d 155.

The term "overriding royalty" connotes in itself an interest free of costs, and the "leasehold estate" is that interest remaining after payment of government royalty.[1]

[1] The government royalty is not, in this instance, a fixed percentage of production but a varying percentage based on the rate of production.

Apparently in an effort to make its decision definite and certain beyond any reasonable doubt, the Court of Appeals specified that the interest recovered was to be the stated percentages of the production creditable to the working interest "free and clear of cost, *subject only to the government royalty.*" The words "subject to" are equivalent to "charged with" or "after payment of" the government royalties. See Words and Phrases, Perm. Ed., Vol. 40, p. 387. Thus the stated percentages are twice indicated as being applicable to the production remaining after deducting government royalties. Interpretation of the language by plaintiffs would ignore or distort the ordinary meaning of the language used.

Plaintiffs have urged that the Court of Appeals must have granted judgment for the stated percentages of the entire production from the leased lands because the percentages stated in the 1926 agreement were intended as percentages of the entire production, but the Court of Appeals' opinion obviously was not intended as a strict enforcement of that contract. All of the parties recognized that the conditions prescribed in that agreement as a prerequisite to the payment of overriding royalty were not and could not be fulfilled. Phillips urged that in this situation the court was without power to grant relief. Plaintiffs, on the other hand, urged that in equity they were entitled to some relief and that where exact performance of a contract is not practicable plaintiffs nevertheless were entitled to approximate relief. The appeal court adopted the plaintiffs' view, commenting in its opinion upon the flexibility of the powers of equity and rendering judgment under its equitable powers for what it considered the plaintiffs were "in equity and good conscience entitled." The decision of the Court of Appeals on the second appeal explains this fully and carefully, saying in part (187 F. 2d at 781):

> "It was these considerations which prompted us, in the exercise of our equitable discretion, to decline lit-

eral enforcement of the permit assignment, but instead to award the claimants the substantial benefit of it by impressing a constructive trust on the proceeds of 4 per cent. of the oil and 7½ per cent. of the gas produced from all of the leases within the original permit area, after the deduction of the government royalty, regardless of the percentage—whether 12½ per cent. or more. In sum, we reasoned that while the Oldlands' rights were rooted in the contract, they were nourished and vitalized by the flexible processes of equitable jurisprudence, and ought therefore to find justification in the conscience of the chancellor."

The judge who wrote the decision on first appeal and those members of the court concurring therein should be the best judges of the purpose and intent of the language employed in the decision on first appeal, and their interpretation should not be disturbed in absence of some important and compelling reason for advancing a contrary interpretation. No such reason has been advanced. The Court of Appeals has obviously, therefore, not violated the principle requiring that the law of the case be followed.

2. The Decision of the Court of Appeals Does Not Conflict With the Decision in Emerson v. Little Six Oil Co., (C. C. A. 5, 1924) 3 F. 2d 265.

The Emerson case holds that under Texas jurisprudence an overriding royalty under a producing oil and gas lease will be considered an interest in real estate for so long as the lease remains in effect. Plaintiffs argue that the Court of Appeals' decision in this case is necessarily to the contrary because the amount of overriding royalty as therein fixed will depend upon the rate of production. Plaintiffs have not established, however, that the Texas rule would be applicable in Colorado. Even if the decision by the Court of Appeals below were contrary to that of the Court of Appeals for the Fifth Circuit, this would not afford a reason for granting a writ of certiorari since the conflict would be merely corollary to a permissible difference of

opinion in the state courts. *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 58 S. Ct. 860, 82 L. ed. 1290. Furthermore plaintiffs do not establish the point that a variable overriding royalty interest could not be an interest in real estate. We are able to find no decisions supporting such a view. The material cited by plaintiffs at page 7 of their petition merely indicates a proper distinction between a royalty interest and a net profits interest. They do not support the view that there is any distinction in so classifying royalty interests between fixed and variable overriding royalties.

The question as to whether an overriding royalty under an oil and gas lease is an interest in real estate is not involved in the decision of the Court of Appeals which plaintiffs seek to have this Court review. There is no conflict between that decision and the decision in the Emerson case.

3. The Court's Interpretation of Its Former Opinion Involved No Unwarranted Exercise of Its Equitable Discretion.

Plaintiffs third reason for granting a writ of certiorari is based upon the unfounded assumption that the decision of the Court of Appeals on the second appeal conflicts with its decision on the first appeal in this case. Since there is no conflict (see point 1 above), the argument falls.

4. This Case Does Not Afford an Appropriate Opportunity for an "Authoritative Decision as to the Method of Computing Overriding Royalty."

Plaintiffs urge that the decision of the Court of Appeals be reviewed in order to furnish the oil industry an authoritative decision as to the manner of computing overriding royalty. Clearly the matter of how overriding royalty is to be computed in any given instance is an appropriate subject for agreement between the parties to the transaction involved, and any decision of this Court in

this case could not alter that situation. The Court of Appeals specified how the royalties should be computed in this case. A decision that the language used by the Court of Appeals to so specify must be given a meaning different from that intended by that court could accomplish naught save confusion. This is particularly true since there is no evidence that that court's language is not in accord with ordinary usage.

5. The Issue as to Federal Jurisdiction Offers No Basis for Issuance of Writ of Certiorari.

The issue of jurisdiction was briefed and argued on the first appeal of this case. The Court of Appeals held that the complaint presented a separable controversy as to Phillips and that the case was, therefore, properly removed. Pertinent language of the opinion is as follows (179 F. 2d 408, at 413):

> "But in addition to the joint relief sought against all of the appellees, the appellants by separate prayer, sought to impress a trust upon the production or its proceeds in the exclusive possession and control of Phillips, and to have Phillips declared to be the trustee of same. All of the appellees or their successors in title are alleged to have some royalty interests in the lease, but only Phillips owned the lease or controlled the interest sought to be charged with the trust. Only Phillips could be held accountable as trustee for the claimed interest of the appellants. As to that aspect of the suit, a separable controversy was presented between the appellants and Phillips, and removal of that controversy transferred the entire case to the federal court, to be judged in accordance with the substantive law of Colorado."

The decision of the Court of Appeals upon this point was not contested by either party nor was the issue raised on petition for certiorari to review that decision. No issue as to jurisdiction was raised in any other subsequent proceeding either in the trial court or on second appeal to the Court of Appeals.

Correctness of the decision of the Court of Appeals on this point is emphasized by the judgment entered which afforded the plaintiffs substantially the relief sought and required payment by Phillips of all sums recovered, no relief being granted against any other party defendant. There was clearly a separable controversy as between plaintiffs and Phillips, which could be (and now has been) fully adjudicated between them. No other party was necessary or indispensable to such adjudication. The case was, therefore, properly removed. *Preston* v. *Kaw Pipe Line Co.*, (C. C. A. 10, 1942) 128 F. 2d 162, certiorari denied, 317 U. S. 674, 63 S. Ct. 80, 87, L. Ed. 541; *State* v. *Neustadt*, (C. C. A. 10, 1945) 149 F. 2d 143; *Sewell* v. *J. E. Crosbie, Inc.*, (C. C. A. 8, 1942) 127 F. 2d 599, certiorari denied, 317 U. S. 643, 63 S. Ct. 36, 87 L. Ed. 518.

Even if there were some doubt as to removability of this cause, such doubt would not afford sufficient basis for granting a writ of certiorari. The new judicial code (28 U. S. C. A. § 1441) alters the rule applicable to removal of causes by reason of separable controversy, so that no useful precedent would be established upon review of this issue. No matter of public importance is involved since construction of rules already replaced would be of no assistance in administration of the present laws. This Court will exercise its jurisdiction to review judgments of the Court of Appeals on writ of certiorari only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. Ex parte Lau Ow Bew, 141 U. S. 583, 587, 12 S. Ct. 43, 35 L. Ed. 868.

CONCLUSION.

Since plaintiffs' petition for writ of certiorari discloses no adequate basis for issuing the writ, that petition should be denied.

Respectfully submitted,

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